

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1074

To be argued by
MARK E. ARROLL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Respondent,

-against-

CLARK BRACEWELL a/k/a JOHN CLARK,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

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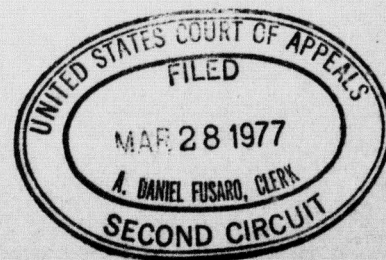


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STATEMENT OF ISSUES PRESENTED
FOR REVIEW BY THE APPEAL

The issues presented by appellant are as follows:

1. Did the Court below err in permitting evidence to be introduced that defendant had engaged in similar transactions to those described in the indictment but which were not the subject matter of the indictment?

2. Did the Court below err in allowing into evidence proof of a prior similar conviction of appellant by way of a confession made to a member of the Department of Justice, United States Immigration and Naturalization Service, after appellant was indicted and in the absence of counsel which statement was ostensibly taken solely to ascertain appellant's status in the country but which in fact was turned over to the United States Attorneys' office two or three days after it was taken for use in the pending prosecution?

3. Did the trial Court err in allowing into evidence proof that at the time of appellant's arrest he had in his possession the sum of \$950.00 and a telegram-money order in the sum of \$1,000.00, the latter representing the return to appellant of the bail money he had previously forwarded on behalf of the co-

conspirator, Helen Brown?

4. Did the Court below err in not dismissing the indictment for the failure of the Government as a matter of law to establish defendant-appellant's guilt as a matter of law?

5. Did the trial Court err in allowing into evidence over objection testimony relating to defendant's life style, his use of drugs and the like?

6. Did the trial judge in sentencing the defendant to four years imprisonment abuse his discretion to such an extent as to require as a matter of law the vacating of the sentence and the resentencing of the defendant?

7. In sentencing the defendant, did the trial Court improperly take into consideration facts which were not part of the trial record such as defendant's alleged participation with his wife involving possession of narcotics in Spain for which defendant was neither charged nor convicted?

STATEMENT OF THE CASE

Defendant is an English national who was indicted on August 31, 1976. The indictment charges defendant in three counts with violating various narcotics laws of the United States.

Count one charges defendant with engaging in a conspiracy to violate sections 812, 841(a) and 841(b)(1)(A) of title 21, United States Code. The indictment further charges the defendant in Count One with conspiring with Helen Brown to distribute and possess with intent to distribute a schedule I controlled substance in violation of 21 U.S.C. 812, 841 (a)(1) and 841 (b)(1)(A). The controlled substance was liquid hashish.

Count Two charges the defendant with violating 21 U.S.C. 812, 841 (a)(1) and 841 (b)(1)(A) and 18 U.S.C. 2, namely, possessing five pounds of liquid hashish with intent to distribute.

Finally, Count Three charges defendant with importing into the customs territory and into the United States from a place outside a Schedule I controlled substance, namely, five pounds of liquid hashish in violation of 21 U.S.C. 812, 951, 952 and 960 and 18 U.S.C. 2.

This indictment, #76 Cr 863 filed August 31, 1976, was superceded by a superceding indictment filed December 9, 1976, bearing # S 76 Cr 863.

The trial of this matter took place on December 20, 21 and 22 in the United States District Court, Southern District of New York, before the Hon. Charles H. Tenney and a jury.

Defendant was found guilty on all three counts and was sentenced on February 4, 1977 to four years on each count, such sentence to run concurrently. Defendant was further ordered to a special parole of three years. Defendant was given leave to appeal in forma pauperis. A notice of appeal was filed on February 14, 1977.

The Government's case

Michael P. McDonnell testified that he is an employee of the United States Customs Service as an inspector and has been so employed for fourteen years (31) *. During the morning of August 12, 1976 he was on duty at Pier 88, North River in New York City when he had occasion to inspect the suitcase of Helen Brown, the separately indicted co-conspirator (31, 32). Ms. Brown had just arrived from Southhampton, England on the Queen Elizabeth II (32). Inspector McDonnell became suspicious and an intensive search of her suitcase was performed in the presence of his supervisor, Charles Melucci,

* All references, unless otherwise indicated, are to pages in the trial transcript.

and another inspector, James Lewis. As a result of the search the suitcase of Helen Brown was found to have a false bottom containing two plastic bags of brown liquid allegedly containing liquid hashish (32-33). The bags were taken from Miss Brown; at no time did McDonnell see the defendant (40). McDonnell performed a "field" test on the substance in question, a test he had performed daily for years, and based on his fourteen years experience in performing these tests, he had reasonable doubt as to whether the sequestered substance was hashish (41).

Helen Brown testified that she was 23 years of age, an English citizen and honor graduate of Durham University majoring in psychology (42, 43, 79). At the time of her trial she was attending graduate school in England as well as teaching, despite the fact that she pled guilty to a narcotics misdemeanor and had two felony narcotics charges outstanding (80). Ms. Brown knew defendant since September, 1975, although she only started dating him in April, 1976, at which time she started living with him. They shared a flat with another couple in a section of London known as Islington at a monthly rental of \$140.00 (168-169, 81). The flat had two bedrooms, bathroom, kitchen, dining room and living room. It was a one flight walk-up (81, 82, 83).

In April, 1976, defendant and Helen Brown purchased tickets for a June 1, 1976 trip to Morocco (51). Brown and

defendant arrived in Asilla, Morocco. Thereafter, defendant made a side trip by himself to Katona. He supposedly confessed to Ms. Brown upon his return that he bought hashish, (51, 52, 53).

Subsequently, defendant supposedly went to England alone with a hollowed out chessboard containing no drugs. He returned from England three or four days later with a suitcase containing no narcotics or hash oil and some money supposedly obtained from selling drugs. Defendant then allegedly made another side trip alone in Morocco where he supposedly purchased more hash oil which Ms. Brown was supposed to take back to England (56, 57). After arriving in England, defendant allegedly requested Ms. Brown to take her suitcase containing hash oil to America. The suitcase bore her initials (122).

Thereafter, Ms. Brown went to America with the suitcase containing hashish oil on the Queen Elizabeth II and was apprehended as previously discussed. The suitcase in question was supposedly purchased by defendant in London and brought back by him to Morocco. He then carried it from Paris to London. She saw defendant handle the suitcase at least two or three times as well as the bags containing the alleged hashish oil. She never saw defendant wipe off his fingerprints or wear gloves while handling these items (114-119).

She claims that at the time of her arrest on August 12, 1976 she was incoherent and didn't remember what she said (100). At the time of her arrival in New York, her customs declaration states she was going to stay at 4706 Jayson Street, Dallas, Texas, the home of Dr. Bert Morrow.

Shortly after Ms. Brown's arrest on August 12, 1976 she commenced to cooperate with the Government. Despite having pled guilty to a narcotics misdemeanor and having two felony counts still outstanding at the time of trial, she was permitted to leave the country in September to return to England. She was not present the last time her case was on the calendar, December 13, and did not know when it was next scheduled (157, 159).

Thomas Leupp, an employee of the Department of Justice, United States Immigration and Naturalization Service, testified at a hearing conducted during the trial in the absence of the jury with regard to the admissibility of a statement made by defendant on October 8, 1976 to Leupp taken at the Metropolitan Correctional Center (MCC) in New York City. He subsequently testified at the trial in the presence of the jury.

The purpose of this October 8, 1976 interview was allegedly to ascertain defendant's status in the United States (144, 263). Mr. Leupp found out about Mr. Bracewell's in-

carceration from the Drug Enforcement Agency. He obtained a statement from defendant admitting a prior drug conviction in England for possession of three ounces of hashish oil (Exhibit 12) (270-271). Defendant supposedly stated that he had "talked to a lawyer in Los Angeles" (the place where he was arrested) who advised him not to talk to anyone until he had talked to an attorney in New York (268). Defendant, nevertheless, made a statement to Mr. Leupp regarding his prior English conviction. At the time of this interview Leupp knew that Bracewell was under indictment, was aware of the nature of the indictment, but did not tell defendant that his statement might be turned over to the United States Attorney (148). In fact, this statement was turned over to the United States Attorney a few days after the October 8, 1976 interview (154). At the time of this interview in New York, Mr. Leupp was aware that defendant had a New York attorney and that the one in California was no longer representing him (151). This Court appointed James A. Pascarella on October 7, 1976. Nevertheless, Leupp made no effort to ascertain the name, address or phone number of the New York attorney. In the presence of the jury, Leupp testified that he did not know if defendant had a New York attorney and was not sure if the Los Angeles attorney was still representing him (268).

Amanda Cuthbert testified that she is an English citizen residing in the United States in the employ of the

Consulate General of Lebanon. In September, 1975, she was living in a flat at 74 Barnsbury Road, Islington, London. The rent was 20 pounds a week (about \$35.00) (168, 169). She left the apartment in mid-September, 1975, and her place was taken by the defendant (166). She never met Bracewell before she moved out and only met him when she returned for some of her belongings. Having met the defendant only once, she inquired where he worked and found out he was not working but living on savings and that he travelled to the United States.

Bert M. Morrow testified that he is a doctor practicing in Dallas, Texas, as a surgical resident, (174). In February, 1976, he was living in London at 92 Carysford Road, as a fourth year medical student, where he got to know Ms. Brown (175). He knew the defendant briefly. He testified that defendant took karate lessons, that he shared an apartment with another couple (178). Dr. Morrow was not aware that Helen Brown was going to be in the United States in August, 1976, nor did he have any plans to see her (179-180).

Murray Mogel testified that he is an attorney employed by the Federal Defender Service of the Legal Aid Society of New York (183). He was appointed by Magistrate Jacobs to represent Helen Brown (184). On August 18, 1976 he received a phone call from an individual called John Clark who inquired about

Helen Brown, where she was, what her bail was and the like. On August 24, 1976 a second call was received from John Clark. He said he was in Los Angeles. Mogel told him that bail was \$1,000.00, that Helen Brown was in jail and would likely remain in jail. In fact, Helen Brown was released on August 19 from jail; Mogel knew this on the 24th and lied to John Clark (192-193). In fact, on August 19 Helen Brown was released on her own recognizance. On September 4, 1976 she was given permission to return to England. She left that day, her trip being paid by the United States Court (198-199). She pleaded guilty on August 30, 1976 to 21 U.S.C. 846, a misdemeanor, and was given one year probation. Mogel "hopes" the felony charges will be dismissed (206). On August 25, 1976 Mogel received a Western Union telegraphic money order for \$1,000.00 together with a telegram (185-186). On August 27 Mogel received another phone call from John Clark at which time Mogel told him he was sending the money back by telegram, as the United States attorney would not accept bail from an unknown source (186-187). On August 30, 1976 Mogel returned the money order to California.

John McCaffrey testified that he is employed by the Drug Enforcement Administration for the past six years as a special agent (209). On August 30, 1976 at about noon time he was

on duty at the Western Union office in Huntington Beach, California. He was with two other agents. At that time he arrested defendant while he was leaving the Western Union station. Defendant answered to the name of John Clark but acknowledged that his correct name was Clark Bracewell (211-212). Defendant stated he was presently unemployed but had recently been employed as a Hi Fi salesman; however, this was never checked out (219-220).

William Phillips testified that he is a forensic chemist with the Drug Enforcement Agency for the past two and one-half years. He has a B. S. degree in Engineering from Brooklyn College (204). He identified Exhibit I as containing hashish oil but was unable to state the percentage (227-228). No fingerprint analysis was attempted to be performed on Exhibit 3, the bags containing the alleged hashish oil, although he acknowledged that it was possible that fingerprints could still be there (231). A fingerprint analysis was performed on the suitcase, Exhibit 1. He found no fingerprints of defendant but did find some smudges (228-230). Phillips testified that he had no knowledge whether the substance he performed a test on on August 17, 1976 was the same substance taken from Ms. Brown on August 12, 1976 (237). Furthermore, Mr. Phillips did not bring any records with him although they exist, (238).

James Castillo testified that he is employed as a

special agent for over three years with the Drug Enforcement Administration. He testified that he got Exhibit 2, i.e., bags found in Ms. Brown's suitcase directly from inspector McDonnell who told Castillo he got them from Ms. Brown, (246, 248, 249). Exhibit 2 was placed by Castillo in his office at 57th Street in Manhattan. It was submitted to North East Regional Lab on August 17, 1976 for analysis on an unspecified date (246). Exhibit 2 was returned to Castillo's office on an unspecified date. No records were introduced to show when it was sent to the laboratory nor when it was returned (251, 252, 253). Exhibit 2 was removed from the safe on at least two or three occasions before trial, i.e., November 12 and 24, 1976, November 29, 1976 (247, 249).

Alfred Cavuto testified that he is employed by the Drug Enforcement Agency for five and one-half years. During this period he made two buys of hash oil, both in June, 1974, (254). Based on his experience and over objection, Cavuto testified that the wholesale value of five pounds of hash oil was between \$35,000-\$40,000 and the retail value was about \$60,000 (256). Cavuto stated the price depended on the quality or percentage of hash oil but that he had no personal knowledge of the percentage of hashish oil in evidence (257, 259).

POINT I

BRACEWELL'S STATEMENT OR CONFESSION TO AGENT LEUPP, MADE AFTER INDICTMENT AND ARRAIGNMENT AND IN THE ABSENCE OF COUNSEL, SHOULD HAVE BEEN EXCLUDED SINCE LEUPP WAS AN AGENT OF THE PROSECUTION WHEN HE ELICITED THE STATEMENT

Defendant, an alien, was arrested on August 30, 1976 in California and was indicted on August 31, 1976. On October 8, 1976 while incarcerated at the Metropolitan Correctional Center, defendant was interviewed by agent Thomas Leupp, Department of Justice, Immigration and Naturalization Service, for the purpose of ascertaining his "status" in the United States. A statement was taken from defendant in the absence of counsel wherein he admitted a prior conviction in England for possession of hashish oil. At the time defendant made this statement he had Court appointed counsel in New York. Agent Leupp knew that defendant had been arrested in California and that his former attorney in California had told him not to make any statements until conferring with his New York lawyer. Agent Leupp, knowing that the California lawyer no longer represented defendant in New York, nevertheless made no attempt to ascertain the name of defendant's New York attorney, or even if he had an attorney in New York.

After taking the statement supposedly taken simply for immigration purposes, it was turned over a few days later to the United States Attorney who was prosecuting defendant.

In Massiah v. United States, 377 U.S. 201 (1964) the Supreme Court held that statements deliberately elicited from the defendant after his indictment and in the absence of counsel denied the Sixth Amendment right to counsel. In Massiah the statements were obtained by a co-defendant who had decided to cooperate with the Government. Holding that the authorities could not, in effect, surreptitiously question the defendant in circumstances where they could not directly interrogate him, the Court concluded:

We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances herein disclosed, could not be used by the prosecution as evidence against him at his trial. (emphasis in original)

377 U.S. at 207

Subsequently, in McLeod v. Ohio, 381 U.S. 356 (1965), reversing Ohio v. McLeod, 1 Ohio St. 2d 60, 203 N.E. 2d 349 (1964); and in Beatty v. United States, 389 U.S. 45 (1968), reversing

377 F. 2d 181 (5th Cir. 1967), the Supreme Court made it clear that "the Massiah rule is not limited to Massiah 'circumstances' but applied to exclude post-indictment incriminating statements of an accused to government agents in the absence of counsel, even when not deliberately elicited by interrogation or induced by misapprehension engendered by trickery or deception."

Hancock v. White, 378 F. 2d 479, 482 (1st Cir. 1967); United States ex rel. Baldwin v. Yeager, 314 F. Supp. 10, 13-14, (D.C. N. J. 1969). Indeed, in Beatty, the Supreme Court reversed on Massiah grounds, even though the government did not instruct its informer to talk to the petitioner or associate with him and even though Beatty himself requested the meeting with the informer and volunteered his confession, without inducement or questioning by the informer. See, 377 F. 2d at 190, supra.

The trial judge allowed this statement into evidence, citing as authority United States v. Barone, 467 F. 2d 247 (2nd Cir. 1972). It is respectfully submitted that Barone is completely distinguishable and in fact is strong authority for the exclusion of the statement.

In Barone after the defendant was indicted, an FBI agent went to his home to arrest him. The agent orally advised him of his rights and showed him a form stating those rights,

including a waiver of counsel. Barone signed the form and then telephoned both his attorney and his bondsman. After making these calls he signed an inculpatory statement regarding his bookmaking activities. The Court found Massiah inapplicable by stating:

In Massiah v. United States, the Supreme Court held that the inculpatory statements deceptively elicited from an indicted defendant in the absence of counsel were inadmissible. The circumstances of the present case are quite different from the circumstances of Massiah. Here there was not only no deception but an express waiver of counsel signed by Barone, see Miranda v. Arizona, 384 U.S. 436, 475-476, 483-486, 865 Ct. 1602, 16 L E d 2d 694 (1966) and a telephone conversation between Barona and his attorneys. We hold that Massiah is inapplicable (P. 249)

In the present case there was deception and absence of counsel as well as lack of consultation with counsel.

Here defendant was told the questioning was only in connection with his status in the country as an alien. He was not told the statement would be turned over a few days later to the United States Attorney as an aid in prosecuting him for drug charges. The argument by the government below that the statement did not relate to the subject matter of the indictment is less than candid. That statement, although literally true, neglects to mention that the subject matter of the statement was used during

the trial to show a prior similar conviction.

The ostensible purpose of proving this prior conviction was to show intent, motive, lack of mistake, modus operandi and the like. It will be remembered Helen Brown testified that the reason she was the courier of drugs rather than defendant was because he had a prior record while she had none and, therefore, defendant suggested he would be more likely to be searched than her.

The suggestion by the Court that Bracewell had consulted his attorney in the same manner as Barone did is a serious misconception of Barone. In Barone defendant telephoned both his lawyer and bailbondsman immediately before he signed the confession. Here the defendant was arrested in California on August 30, 1976. He apparently appeared at a judicial proceeding in California for the limited purpose of fixing bail which was set at \$20,000. The record is not clear if any other matters were transacted in California such as arraignment, removal and so forth. The record below does not even indicate the name of defendant's Court appointed California attorney. Apparently, this California lawyer advised defendant not to make any statements until he first got the approval of his New York counsel. Once defendant arrived in New York on August 31, 1976 his attorney in California was clearly

his former attorney both defacto and dejure.

On October 8, 1976 when defendant signed his inculpatory statement, he was not represented by California counsel. He was represented by New York counsel. The suggestion that defendant made an intelligent waiver on October 8, 1976 because of his consultation with counsel in California on August 30, 1976 when this issue did not exist cannot be seriously urged. Defendant's present counsel was appointed on November 12, 1976. Defendant's prior New York counsel, James Pascarella, was appointed on October 7, 1976. Since defendant had New York counsel on October 8, 1976 any consultation resulting in an intelligent waiver would have to have been with him.

The holding in United States v. Barone, supra, was recently followed by this Court in United States v. Satterfield, Docket No. 76-1372. This Court emphasized the heavy burden imposed on the government to demonstrate that a defendant had "knowingly and intelligently" waived his Sixth Amendment rights citing Faretta v. California, 422 U.S. 806, 835 (1975) quoting Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938).

In Satterfield this Court distinguished it from Barone and United States v. Lam Lek Chong, _____ F. 2d _____ (1976) slip. op. 5725, 5745-6, both cited by Judge Tenney below

in allowing this inculpatory statement to be admitted. The reference by this Court in Satterfield, page 808, to the defendant in Barone and Lam Lek Chong to the defendant speaking to his attorney before signing his statement was made in the context of a defendant speaking to his present attorney immediately before he signed the statement rather than consulting with a former attorney weeks before the statement was ever elicited or in issue.

If this matter was an ordinary civil suit between private litigants it would be highly unethical for an attorney representing one party to communicate with an adversary represented by counsel. See Code of Professional Responsibility, DR 7-104.

"DR 7-104. Communicating With One of
Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

In Drinker, Legal Ethics, (4th Ed. 1963), page 201, Columbia University Press, the same conclusion is reached by

quoting from Canon 9 of the Code of Ethics as well as other authorities. To the same effect is Wise, Legal Ethics, (2nd Ed. 1970), Matthew Bender. The January, 1977, supplement of Wise, pages 100-101, sets forth interesting examples establishing the stringency of this rule.

It should hardly be necessary to mention if communicating with one's adversary in civil litigation is not countenanced then in criminal matters the rule should be applied with even greater vigor.

It cannot be over-emphasized the unnecessary prejudicial effects of allowing the prosecution to show that defendant on a prior occasion had committed a similar crime in England for which he was convicted. The prejudicial effect of this statement regarding defendant's prior English conviction for possession was greatly exacerberated by the Government's constant references to defendant's life style in dealing in drugs and living sumptuously (50, 52, 168, 169, 279, 306). The showing of similar criminal acts necessarily conveys to the jury the impression that the defendant is a "bad guy" and that evidence of prior crimes has direct bearing as to his guilt or innocence for the crime charged in the indictment. Precautionary statements made by the Court to the jury are meaningless. "The naive assumption that prejudicial

effects can be overcome by instructions to the jury....all practicing lawyers know to be unmitigated fiction" Krulewitch v. United States, 336 U.S. 440, 453 (1948) concurring opinion Jackson. Mr. Justice Jackson's assessment has received support from perhaps the most empirical study of jury behavior ever attempted; see Kalven and Zeisel, The American Jury, 127, 130; 177-180.

Defendant made an omnibus pre-trial motion to prohibit the prosecution from using any of defendant's prior convictions. The Court granted this motion to the limited extent of enjoining the Government from using these convictions on cross-examination but permitted them to be used as part of their direct case where relevant to proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident citing Federal Rule of Evidence, 404(b). See page 7 of Judge Tenney's memorandum dated December 13, 1976:

Counsel acknowledges the existence of United States v. Rapoport, No. 76-1291 (2nd Cir. November 4, 1976) and United States v. Stassi, No. 76-1110 (2nd Cir. October 26, 1976) but urges the Court to either reconsider these decisions or alternatively to limit them to their particular facts.

The rule is well settled that the prosecution may not

introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character.

McCormick, Evidence, Section 157 (1954 Ed.). A more detailed description of this general rule of exclusion is to be found in 1 Wigmore, Evidence, Sections 193-194 (3rd Ed. 1940).

As Wigmore points out, evidence of prior crimes is objectionable not so much as a matter of logic, as it is undoubtedly somewhat probative, but as a matter of social policy, because the jury is more likely to give it more weight than it deserves and might decide that the defendant deserves to be punished because of the past crime without regard to whether he is guilty of the crime currently charged.

1 Wigmore, Evidence, Section 193-194 (3rd Ed. 1940). The major exception to this rule of exclusion was developed in the landmark New York case of People v. Molineux, 168 N.Y. 264 (1901). The Molineux has been codified in Federal Rule of Evidence 404(b) mentioned previously.

Molineux allowed evidence of other crimes to be admitted to show common plan or scheme, intent, lack of mistake, to establish identity, etc. The cases following Molineux have

clearly demonstrated that the contravention of the common law principle of inadmissibility of other criminal acts is strictly construed. It should be noted that in the Molineux case itself the murder conviction of the defendant was reversed because the prosecution was allowed to introduce evidence of another murder by the same defendant employing identical means.

A plea of not guilty automatically requires the prosecution to prove each and every element of the crime beyond a reasonable doubt. Such a plea automatically raises the question of identity, intent, motive, mistake and so forth. That being the case if the exceptions created by Molineux now codified in Federal Rules of Evidence, 404(b) were to be applied mechanically, then in each and every criminal case, the Government would be able to show similar criminal acts by the defendant, assuming they exist, even though not the acts with which the defendant is charged. The issue raised must be genuine, Wakasian v. United States, 367 F 2d 639, 645 (8th Cir. 1966).

The introduction into evidence by the Government of defendant's prior conviction coupled with the repeated references to defendant's life style, his alleged prior dealings with drugs and the like were offered for the ostensible purpose of showing intent, and absence of mistake. Supposedly defendant,

knowing about his prior record, thought he would be a poor risk to bring the hashish oil into the United States and, therefore, had Helen Brown do it. It is respectfully submitted this evidence is at best tangentially relevant. Its actual effect, intentional or otherwise, was to show defendant's evil character as documented by specific criminal acts other than those which he was charged with in the indictment. This is serious error. The reference by the Assistant United States attorney during summation that the \$950.00 and the \$1,000.00 money order found on defendant when arrested were both the proceeds of the sale of hashish on some prior occasion not charged in the indictment is reversible error (285).

Michelson v. United States, 335 U.S. 469 (1948).

The common rule which generally prohibits the introduction into evidence of other similar crimes is founded upon the premise that the admission of such other acts is highly prejudicial and denies defendants a fair trial.

"Lovely v. United States, 169 F. 2d 386, 389 (C.A. 4th Cir. 1948):

" The rule which thus forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence. If such evidence were allowed, not only would

the time of courts be wasted in the trial of collateral issues, but persons accused of crime would be greatly prejudiced before juries and would be otherwise embarrassed in presenting their defenses on the issues really on trial."

Railton v. United States, 127 F. 2d 691, 693
(C.A. 5th Cir. 1942):

"...It is logical to conclude, and very apt to be concluded, that because a man was dishonest once he will steal again. It is certainly more probable that a crooked official did steal than if he were an upright one. Yet our law forbids these very premises. It cannot be shown that the accused has committed other similar crimes to show that it is probable he committed the one charged."

Tedesco v. United States, 118 F. 2d 737
(C.A. 9th Cir. 1941)

Swann v. United States, 195 F. 2d 689
(C.A. 4th Cir. 1952)

United States v. Jacangelo, 281 F. 2d 574
(C.A. 3rd Cir. 1960)

The New York cases upon which Rule 404(b) is based only allowed proof of other crimes where they had a strong nexus to the one set forth in the indictment. In Hope v. People, 83 N.Y. (1881) 418, the defendant was indicted for robbery in the first degree. The Court held that it was permissible to show that on the same night the bank was burglarized that the defendant robbed the janitor of the bank of the bank key. Here, the relationship of the two

crimes is so manifest that no extended discussion is necessary. The theft of the bank key from the janitor was a necessary prerequisite for the accomplishment of the ultimate crime of the robbery of the bank itself. There is no such parallel in the case at bar.

The Court of Appeals in People v. Liller, 20 N.Y. 2d 727 (1967) reversed 26 App. Div. 2d 983, adopted the dissenting opinion of Gibson, Jr. and held that in a rape case it was inadmissible to admit on the prosecutions direct case and over defendant's objections evidence as to an assault allegedly committed by the man two hours before the commission of the rape charged in the indictment even though complainant testified: "He told me that if I didn't stop (resisting) that he would kill me; that he had killed a Negro earlier that evening and he didn't care whether he killed me or not."

In other instances the Courts have permitted introduction of crimes other than those charged in the indictment when the commission of the other crimes was a necessary prerequisite of the crime charged in the indictment. In People v. Formato, 286 App. Div. 357, 364 (3rd Dept. 1955) defendant was charged with common gambling. It was necessary in order to prove this crime that defendant gambled not occasionally, but with professional intent. It was, therefore, both proper and necessary for the

District Attorney to offer such proof. Interestingly, the Court found the prior occasions too remote and reversed. See also People v. Dziobecki, 162 NYS 2d 597 (1956); Matter of Booth, 215 App. Div. 516 (1926).

The Court is urged to apply the universal rule in this case that a person cannot be convicted of one offense upon proof that he may have committed another, however, persuasive in a moral point of view such evidence may be. The Courts are aware that it is easier for a jury to believe a person guilty of one crime if it is known to them that he had committed another of a similar character or indeed of any character, but the injustice of such a rule in our Courts is apparent. It would lead to convictions upon the particular charge made by proof of other acts not legally connected with it.

POINT II

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE PROOF THAT AT THE TIME OF DEFENDANT'S ARREST HE HAD IN HIS POSSESSION NINE HUNDRED FIFTY DOLLARS IN CASH AND A ONE THOUSAND DOLLAR MONEY ORDER. THE COURT FURTHER ERRED IN ALLOWING COMMENT BY THE ASSISTANT UNITED STATES ATTORNEY THAT SUCH MONEY WAS THE PROCEEDS OF AN HASHISH SALE NOT CHARGED IN THE INDICTMENT

The United States Supreme Court in Williams v. United States, 168 U.S. 382, 18 S. Ct. 92, 42 L. ed. 509 (1897) long ago

established the principle that it is reversible error to allow into evidence proof that defendant at the time of his arrest had unexplained wealth even though the crime charged involves pecuniary gain. In Williams v. United States, supra, the defendant, a Chinese inspector, was on trial for having extorted \$100.00 on one occasion and \$85.00 on another from Chinese immigrants. His salary was between \$100-\$150 per month. Evidence that he deposited approximately \$5,000 in his bank account in the year when the offenses were alleged to have occurred was held inadmissible and reversible error. The Court stated at pages 396-397 its holding in clear and unequivocal language.

"Upon the face of the transactions referred to there was no necessary connection between the deposits and the specific charges against the defendant. And yet the jury were in effect told that the failure of the accused to explain how he came by those sums, aggregating nearly five thousand dollars, was a circumstance tending to show that if he had given that explanation it would have operated to his prejudice in meeting the particular charges against him, of extorting at one time \$100, and at another \$85, under color of his office. There was no such connection shown between the possession by the defendant of the sums specified in the affidavit and bank books, and the alleged extortion by him of two named sums from certain persons, under color of his office, as required him to explain how he acquired the moneys referred to in the affidavit and bank books. The manifest object and the necessary effect of this evidence was merely to give color to the present charges, and

to cause the jury to believe that the accused had in his possession more money than a man in his condition could have obtained by honest methods, and, therefore, he must be guilty of extorting the two sums in question....But that did not justify the conclusion that he had, under color of his office as Chinese inspector, extorted one hundred dollars upon one occasion and eighty-five dollars upon another occasion. The accused was entitled to stand upon the presumption of his innocence, and it cannot be said from anything in the present record that he was under any obligation arising from the rules of evidence to explain that which did not appear to have any necessary or natural connection with the offense imputed to him. In our judgment the Court, under the circumstances disclosed, erred in not excluding the affidavit and bank books as evidence, as well as in what it said to the jury on that subject."

In opposition to defendant's motion for a new trial heard at the time of sentencing, the Government argued that such evidence is admissible under the authority of United States v. Tramunti, 513 F. 2d 1087 (2nd Cir. 1975). Tramunti is clearly distinguishable. In the first place, defendant Bracewell is not charged with selling any narcotics and, in fact, they were seized before any distribution was made whereas in Tramunti there was strong evidence that the money seized was the result of the sale of heroin. Furthermore, in Tramunti the money was not offered into evidence as here, but merely a photograph of it. The Court emphasized that the result might well have been different if the

actual money had been received stating:

"The argument that so much cash was so sensational, inflammatory and prejudicial as to outweigh its relevancy we find unimpressive. The argument suggests that the cash itself was in the courtroom, but it was made clear to us on argument that at most a photograph of the money was received."
(Emphasis supplied, Page 1105)

The holding of Williams v. United States, supra, was followed in United States v. Dean, 435 F. 2d (6th Cir. 1970). Defendant was charged with possession of passing counterfeit notes. He was acquitted of "passing" but convicted of "possession". At the time of his arrest he had five thousand dollars on him. He was a barber. The Court found the introduction of this money error citing Williams v. United States, supra.

In other cases where evidence was admitted that at or about the time of defendant's arrest he had either actual or constructive possession of large sums of cash, it was shown by clear proof that the crime charged had been consummated, money obtained and that the "evidence overwhelmingly showed a necessary or mutual connection between the offense and the defendant."

United States v. Manning, 440 F. 2d 1105 (5th Cir. 1971).

To the same effect is United States v. Chang, 446

F. 2d 571 (3rd Cir. 1971). Here the Court not only imposed the above limitations on admissibility but made it contingent on the sudden unexplained acquisition of wealth by an impecunious person at or about the time of a theft which he had an opportunity to commit.

Defendant committed no theft and, in fact, it is conceded the crimes with which he was charged could not have resulted in his obtaining any money because the subject hashish oil was confiscated intact at its point of entry.

Furthermore, the Government's own proof is that before the alleged conspiracy ever took place, which apparently commenced about June 1, 1976 when defendant and Brown went to Morocco, defendant had plenty of money, went to expensive restaurants, took trips abroad, used cabs, lived in an expensive apartment and the like. (See the testimony of Amanda Cuthbert (166-169), Dr. Bert M. Morrow (176-180), the summation of the Assistant United States Attorney, and the testimony of agent McCaffrey as well as that of Helen Brown). The Government went out of its way to show that defendant was never impecunious as is required by the above authorities and that he always had money, etc. The proof that defendant always had money not only mandates against admissibility of the \$950.00 cash and the \$1,000.00 money

order but creates further reversible error because the Government strongly implied that the money must have come from other drug transactions not the subject of the indictment. This has been discussed under Point I.

Other cases which have allowed the admissibility of large sums of cash found in the possession of the defendant have superimposed an additional requirement of attempted concealment.

United States v. McKenzie, 414 F. 2d 808
(3rd Cir. 1969)

Anthony v. United States, 396 U.S. 1019
90 S. Ct. 586 24 L. Ed. 2d 510

United States v. Kenny, 462 Fed. 1205
3rd Cir. 1972)

United States v. Jackskion, 102 F. 2d 683
(2nd Cir. 1939)

Defendant made no effort of concealment. He went to the Western Union office himself rather than send a messenger, lawyer, etc. He freely admitted that the money was his and in no way tried to dissemble re his ownership of it.

What is crucial is that all cases cited above the money in the possession of the defendant could have come from the crime committed, i.e., bank robbery, extortion, etc. because the crime had been consummated. That is not the case here.

Furthermore, since the gravaman of admissibility is

to show unexplained acquisition of wealth the Government must make reasonable inquiry as to where the money might have legitimately come. United States v. Falley, 489 F. 2d 33 (1973). In Falley the Court stated "...the government may not disregard explanations of the defendant reasonably susceptible of being checked" (P. 39) citing Holland v. United States, 348 U.S. 121, 138 75 S. Ct. 127, 137 99 L. Ed. 150 (1954). Here the arresting officer McCaffrey testified that at the time of his arrest defendant said that approximately two months before he worked as a salesman in London but that McCaffrey never checked it out, that no one else to his knowledge attempted to verify this and that for all he knew the statement could be 100% accurate (219-220).

The Court's attention is directed to a recent State case in this area, People v. Galletti, _____ A.D. 2d _____ (First Department, decided December 30, 1976), N.Y.L.J., January 17, 1977, Page 1. In Galletti, supra, the defendant was charged with the sale of narcotics in 1974. She denied each of the alleged sales, supposedly made to an undercover agent. The defendant testified during cross-examination that from 1966 to 1973 she was on welfare. The District Attorney, in attempting to rebut the defendant's allegation of indigency introduced proof that at the time of her arrest defendant had in her handbag approximately \$1,500 in cash and four bank books totalling \$25,000, all bearing her name, except for one for approximately \$12,000.

The Court held that not only was this evidence irrelevant

despite defendant's assertion of indigency, but that its prejudice so outweighed its probative value, if any, that a new trial was ordered. Here, despite overwhelming proof of defendant's guilt, the Court ordered a new trial because these matters were obviously collateral and any tangential value was clearly outweighed by its prejudice. If this is true in Galletti, supra, then certainly it must be true in this matter, for in Galletti the defendant "opened the door" so to speak, regarding her finances, which one might think would be a basis for allowing the District Attorney to rebut, whereas Bracewell never offered any evidence as to his finances and, therefore, never "opened the door".

POINT III

GOVERNMENT FAILED TO ESTABLISH DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT BY FAILING TO PROVE THAT THE SUBSTANCE IN QUESTION WAS HASHISH OIL AND FURTHER BY FAILING TO PROVE THE NECESSARY CHAIN OF CONTROL FROM THE TIME OF THE SEIZURE FROM HELEN BROWN TO THE TIME OF OFFERING THE MATTER INTO EVIDENCE

At trial the Government's own witnesses contradicted each other as to whether the subject substance was hashish oil or not. Michael P. McDonnell, a 14 year employee of the United States Customs Service, who seized the matter from Mrs. Brown, stated that he had reasonable doubt based on his field test whether the substance was hashish oil (41). His reasonable doubt was based on his daily experience in administering his chemical test daily for a period of 14 years. The Government's chemist, a Mr. Phillips, who had

only 2 1/2 years experience with a bachelor's degree, stated that the substance was hashish oil and further stated his opinion in this area as "infallible" (240).

Based on this inconsistency between the Government's own witnesses, reasonable doubt exists as a matter of law.

Even if this inconsistency is resolved in favor of the Government, their proof is nevertheless lacking for failure to prove that the material taken from Ms. Brown was the material tested and was the material offered into evidence.

The material was seized from Ms. Brown on August 12, 1976. Some substance was tested on August 17, 1976. No adequate proof was offered to account as to what happened to the seized material during these five days. No records were introduced showing its location, its custodian, the persons who had access to it and so forth. The same dearth of information exists as to the control, possession and location of the tested substance from August 17, 1976, the day it was supposedly tested, to the day it was offered in evidence. In sum there was neither sufficient evidence to show that the material seized was hashish oil nor that the material offered in evidence was the material seized.

POINT IV

DEFENDANT WAS DENIED A FAIR TRIAL BY IMPROPER
COMMENTS MADE OR ELICITED BY THE GOVERNMENT
AND THEIR WITNESSES

Reference has already been made as to the impropriety of getting into evidence defendant's prior criminal record, and his alleged criminal activities not covered by the indictment. The

constant references that defendant visited a "dope farm" (52), his "high living" without visible means of support when it suited the Government's purpose to try and show he must have been dealing in drugs and his impecuniousness when that suited the Government so that the \$950.00 in cash and the \$1,000.00 money order found on him when arrested could be gotten into evidence to show he must have been dealing in drugs, are some examples of the unfair and inconsistent attacks made by the Government. The Government's summation when Bracewell was accused although not charged with dealing in drugs in England and that the money and money order found on him when arrested must have represented the proceeds of the sale of other drugs is highly improper and prejudicial (279, 281, 282, 285, 286, 306, 309). The totally unsupported testimony of Agent Cavuto that the hashish oil was worth \$35,000 wholesale and \$60,000 retail should never have been permitted to stand. Agent Cavuto had made a total of two buys in his life. The agent admitted the value would depend on the percentage or quality of hashish oil and he didn't have any idea of its percentage. His reading of Government periodicals as a basis what hard drugs sell for on the "street" is laughable. Or that theory, everyone is qualified to express an expert opinion in this area. The testimony was introduced solely for sensationalism. Even Judge Tenney expressed doubt as to its relevancy (261).

The unsolicited testimony of Henry Mogel, Ms. Brown's attorney, in response to a question whether he was acting as a

Government agent stated he was "protecting her against any person who might wish to harm her" (193) was highly prejudicial. The cumulative effect of these errors was to deprive defendant of a fair trial.

POINT V

THE SENTENCE OF FOUR YEARS WAS EXCESSIVE AND THE DEFENDANT IN THE EVENT OF AN AFFIRMANCE SHOULD EITHER HAVE HIS SENTENCE VACATED OR HAVE THE CASE REMITTED TO THE TRIAL COURT FOR RESENTENCING IN ACCORDANCE WITH CLEAR GUIDELINES BY THIS COURT

With all due respect, the sentence of four years for importation of hashish oil, which is nothing more than a minor variant of marijuana, is unconscionable. Counsel is mindful of the fact that Appellate Courts rarely interfere with the sentencing of the trial Court provided the sentence is statutorily sanctioned. Courts, including this one have not hesitated to fashion exceptions to obsolete and unfair rules when their sense of justice is offended. This is such a case. This Court is in a better position than defense counsel to know that the typical sentences in this circuit for this offense range from probation to one or two years at worst. Defendant is twenty-five years of age and married. He comes from a broken home with an alcoholic father. Both his mother and step-father are seriously ill. He is intelligent and contrite. Defendant has two alleged prior convictions for possession of hashish oil in the range of one to three ounces. One conviction was in England, the other in Germany. Neither resulted in jail

time but rather small fines, probation in one instance (England) and deportation in the other (Germany). The German conviction has never been verified documentarily and the papers furnished counsel by the Government appear capable of being interpreted as a deportation proceeding rather than a criminal matter. In any event, these matters would certainly have been treated in this Circuit as offenses or misdemeanors and might have even been nollied. In the State Court they could have routinely been adjourned in contemplation of dismissal (ACD) under CPL 170.55 and 170.56.

Helen Brown who is substantially as culpable as the defendant was allowed to plead to a misdemeanor and was given probation. The so-called "pending" felony counts will ultimately be dismissed or nollied if they have not already. Ms. Brown was released without bail in her recognizance and allowed to return to England and attend school. Anticipating the Government will argue that her offenses are extraditable the proper rejoinder is the realities of life are that the remaining charges will be dropped. The disparity in sentencing is incredible. They both are approximately the same age; she had no prior criminal record; he had a minor one; they both knew what they were doing; she is single; he is married.

Perhaps the latter point is most salient. The Court at sentencing made it clear that it knew Mr. Bracewell was married and that his wife was in a Spanish jail at the time he was living with Ms. Brown. The Court made it quite clear that it felt defendant

was just as guilty as his wife, who was incarcerated in Spain on another matter, but by luck or otherwise the Spanish authorities let him go presumably for the purpose of raising \$20,000 to secure his wife's release. The Court's comments at sentencing (378-379) clearly indicate the Court thought Bracewell equally guilty as his wife for the Spanish incident, and perhaps the Court unconsciously decided to punish defendant now for other crimes committed in the past, not the subject matter of this proceeding. This is totally improper. Appellate Courts may always modify a sentence if the reasons for its imposition are improper. Scott v. United States, 419 F. 2d 264 (1st Cir. 1969). This Court has followed the rule of United States v. Wiley, 278 F. 2d 503 (7th Cir.) that an appellate court may set aside a jail term if it is too harsh. See United States v. Doyle, 348 F. 2d 715 (2nd Cir.); United States v. Mitchell, 392, F.2d 214 (3rd Cir.). In United States v. Mitchell, supra, Judge Kaufman in his concurring opinion stated, "But it is not beyond the power of a federal Appellate Court to vacate a sentence based upon clearly erroneous criteria". (p. 217).

An excellent discussion of the authority of federal Appellate Courts to review excessive sentences is found in Moore's Federal Practice, Vol. 8A, Section 32.09.

POINT VI

THE SUM OF \$950.00 AND THE \$1,000.00 MONEY ORDER
SHOULD BE RETURNED TO THE DEFENDANT FORTHWITH
IRRESPECTIVE OF THE RESULT OF THIS APPEAL

By formal motion returnable February 4, 1977, the day of

sentencing, defendant moved for the return of his \$1,950.00. No decision has been rendered. On February 19, 1977 counsel wrote to Judge Tenney requesting a formal decision or order. None has been forthcoming. The Court's attention is directed to a host of recent cases declaring such forfeiture void. Boyle v. Kelley, 53 App. Div. 2d 457 (2nd Dept. 1976); McClendon v. Rosetti, 460 F. 2d 111 (CA 2d 1972); Matter of Abramowitz, New York Law Journal, February 3, 1977, Page 15 (Sup. Ct. Nassau Cty., Young, J.); Matter of Caggiano v. Frank, 78 Misc. 2d 187.

In Caggiano, supra, the Court stated the appropriate rule as follows:

"One of the basic principles guiding public life in this country is that no governmental body may confiscate a citizen's property without due process of law. (U.S. Const. 14th Amdt.; N.Y. Const., art. 1, Section 6; Goldberg v. Kelly, 397 US 254; Dobkin v. Chapman, 21 NY 2d 490; U.S. Code, tit. 28, Section 1343). Indeed, even when incidental to an arrest, a police seizure of property other than contraband (that is, the object or instrumentality allegedly used in the criminal activity such as drugs or weapons) is unconstitutional. (McClendon v. Rosetti, 460 F. 2d 111; see, Stengel v. Smith, 18 AD 2d 458). Here, the taking of cash, claimed incidental to a numbers running charge, appears not to be contraband, as opposed to the numbers stubs themselves. In any event, even were the initial seizure valid, later, when official prosecution for the claimed criminal activity ceased, by way of the dismissal of charges, then any arguable public right to the money dissipated. (See Aranofsky v. Grupposo, 72 Misc. 2d 701; Marshall v. Kennedy, 17 Misc. 2d 985, 988). Under such circumstances, there is little doubt but that petitioner is entitled to compensation for a government taking."

Anticipating the Government will argue this money should be retained under 18 U.S.C. 3006 (A)(F) as they did in a letter to

Judge Tenney dated February 10, 1977, suffice it is to say everyone
kr about this sum of money since August 30, 1976 and it did not
prevent the Court from appointing two attorneys to represent
defendant without so much as a hint that this modest sum be
depleted to pay counsel. This is really a form of forfeiture in
not too subtle disguise.

CONCLUSION

The conviction should be reversed or alternatively a new
trial ordered or even if affirmed the sentence should be set aside
as excessive and defendant resentenced and in all events defendant's
\$1,950.00 be returned to him.

Dated: New York, New York
March 24, 1977

Respectfully submitted,

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